PATRICK LOFTUS: Thank you for joining this webinar today entitled "An Architect of the ADA on Its Application to Modern Technology." I'm Patrick Loftus from 3Play Media, and I'll be moderating today.

I'm very excited to be joined today by Bobby Silverstein, who is a principal in the law firm of Powers Pyles Sutter & Verville in Washington, DC. And he is also the former staff director and chief counsel to the Senate Subcommittee on Disability Policy, and was a chief aide to Senator Thomas Harkin, the sponsor of the Americans with Disabilities Act.

We have about an hour for this presentation. The presentation itself will last about 45 minutes. And we'll leave about 15 minutes at the end for questions. And with that, I'll hand it off to Bobby, who has a great presentation prepared for you all.

BOBBY SILVERSTEIN: Well, thank you Patrick. I appreciate it. Thank you. Hi. Again, this is Bobby Silverstein. Thank you, Patrick, for that introduction. I did have the privilege and honor of working with Senator Tom Harkin, the chief sponsor of the ADA, as his staff director and chief counsel.

For the last 20 years, I have served in various capacities analyzing disability policy, including directing the Center for the Study and Advancement of Disability Policy. And as Patrick said, I am currently a principal in the law firm of Powers Pyles Sutter & Verville. I'm also a member of the Partnership on Employment and Accessible Technology, or PEAT team. This is an initiative funded by the United States Office of Disability Employment Policy and the Department of Labor. And at the end of my presentation, I will describe some of the resources available on the PEAT website. Next slide please.

Typical disclaimers. PEAT receives funding from, as I said, ODEP, but the views expressed on this webinar are mine and mine alone and do not necessarily represent the views of ODEP, the Department of Labor, or any other agency organization. And also please remember that this presentation does not provide legal advice. You need to consult with your attorney for that. Next slide please.

Today what I'm going to do is first start with an overview of the ADA. I am then going to try to provide you with a brief explanation of the application of the ADA to acceptable information communication technology, with a particular focus on access to websites. Then we'll walk through some of the key Department of Justice settlement agreements in this area, briefly provide an overview of the Department of Justice supplemental advanced notice of proposed

rulemaking to clarify Title II of the ADA, which applies to state and local governments. And Title II applies to website accessibility. I will then provide you with some takeaways and references or resources that you may want to use.

In terms of the overview of the ADA, let's start with the historical and policy context. Why did Congress feel the need to pass the ADA in the first place? There was a lot of testimony, review of reports and studies, which showed a history of exclusion, segregation, and denial of services to people with disabilities.

Let me give you an example of some of the witnesses. Dr. I. King Jordan, who is deaf and was president of Gallaudet University, described how people with hearing impairments and who were deaf were denied effective and meaningful opportunity to interact with others, whether at school or work or at play. A Harvard Law School student who was at the top of his class, who happened to also be blind, described his inability to get even a single interview from large law firms. A Vietnam veteran, Perry Tillman, testified that he had a mobility impairment from his service for the country in Vietnam, how he could not access public transportation. We heard about children with Down syndrome who were kicked out of a zoo in New Jersey because the zookeeper was afraid that the children's presence would scare the chimpanzees. Justice Thurgood Marshall, in a Supreme Court case, described our treatment of people with disabilities as, quote, "grotesque, and in many cases worse than the worst excesses of the Jim Crow laws."

So ADA is important because it recognized that disability rights are civil rights. Under the ADA, there are three prongs to the definition of disability-- number one, a physical or mental impairment which substantially limits a major life activity, two, a history of having an impairment, and three, being regarded as having an impairment.

Now after the enactment of the ADA, there were a number of Supreme Court decisions interpreting the term disability. And the Supreme Court narrowed the definition way beyond what was the original intent of Congress. In 2008, in the ADA Amendment Act, Congress overturned these cases. And basically now the term is to be construed very broadly. And the focus of claims should be on whether or not there was discrimination, not whether or not an individual was protected by the law.

The ADA also includes a definition of qualified individual. In an employment context, it's a person who can perform the essential-- the essential functions of the job with or without a

reasonable accommodation. An individual to be qualified need not be able to perform all general job functions.

Let me briefly go over the core concepts of nondiscrimination. The first is you treat people based on facts, based on objective evidence, not fear, ignorance, prejudice, and pernicious mythologies. The second key notion is you provide services or allow the individual to function in the most integrated setting appropriate. And the third and the most important for the purposes of this webinar is the concept that opportunities, in order to be equal, must actually also be effective and meaningful. And that translates into things like making buildings, facilities accessible, providing accommodations, and modifying policies, practices, and procedures-- concept of genuine, effective, and meaningful opportunity.

Another core principle is you cannot makes contracts or enter into other arrangements which have the purpose or effect of denying people with disabilities meaningful opportunity. You can't adopt methods of administration that deny effective and meaningful opportunity.

And then there are some affirmative defenses. You are not required to make changes or provide accommodations if it will result in an undue hardship or fundamental alteration in the essential nature of the program.

Let's go on to the next slide and look at technology and the ADA. When the ADA was signed into law in 1990, the internet as we know it today did not exist. In 1992, when DOJ made clear in its original regulations that the regulations should be interpreted, quote, "to keep pace with developing technologies." So there was a recognition that technologies would change and advance over time, and the regulations should be construed broadly to recognize the modernization of technology.

Now today, we all know that web-based information, online applications have become a major gateway to employment. Why? Because recruiting and hiring systems are often web-based. In many cases, the only way to search and apply for a job is online.

In addition, we know that employers frequently use intranet websites. Why? To conduct job related testing for employees, provide training to employees, and to share information about fringe benefits and some sponsored events and activities that are occurring.

In light of the critical role that websites and online systems play in current society, it is absolutely essential that employers and others covered by the ADA-- private businesses--

design, purchase, lease, maintain, and use products and services that are accessible to the widest possible range of functional capabilities. We call this universal design.

And we also know that millions of people with disabilities will have functional limitations. These disabilities and limitations can affect their use of the web. Some people use assistive technology devices or software to enable them to navigate the web. But many websites do not incorporate or activate features that enable these users to access all of the website's information and data. For example, too many websites are incompatible with speech recognition and screen reading, or they lack text-based alternatives, or for individuals who are deaf cannot access web videos if there are no captions.

We also know that for some people with limited dexterity and vision disabilities, they need assistive technology to enable them to interact with websites because they can't access sites that do not support keyboard alternatives for mouse commands. And also we know that some people encounter difficulty using the website because of the time responses. Some websites just will only stay on for a couple of seconds. And for some users, that denies an opportunity.

Let me summarize the issue in terms of accessibility to website. I'm quoting the Department of Justice and recent testimony before Congress. "As more and more of our social infrastructure is made available on the internet, in some cases exclusively online, access to information and communication technologies is increasingly becoming the gateway civil rights issue for individuals with disabilities." The gateway civil rights issue. Department of Justice in the testimony also explained that we must avoid the travesty that would occur if the doors that are opening to Americans from advancing technologies were closed for individuals with disabilities because we were not vigilant.

Let's now look at the applicability of the ADA to ICT, Information Communication Technology, accessibility. What are some of the general rules that are currently in the existing ADA regs? In the employment context, it is clear that people with disabilities are entitled to effective and meaningful opportunity to all aspects of employment, including information and data related to recruitment, applying for a job, hiring, retention, advancement, and other terms, conditions, and privileges of employment. And DOJ has also stated categorically that the ADA requires that all goods, services, programs, or activities, including those available on the website, must be accessible to and usable by individuals with disabilities. And let me just quote what DOJ has said in this regard. "There is no doubt that the program, services, and activities on websites are covered by the ADA." So the general nondiscrimination rules included in the ADA regs

apply to accessible websites, online systems, absent other forms of ICT.

And let's now take that broad principle that I described previously-- that equal opportunity includes the provision of genuine, effective, and meaningful opportunity. What this means in the context of information and data is that if you make information and data available to people without disabilities, it must be made available to individuals with disabilities as well.

And what does effective and meaningful mean? Well DOJ and others have explained that it means that you look at effective and meaningful in terms of access to information and data in terms of degree of immediacy-- in other words, the timeliness of delivery-- convenience, flexibility, independence, efficiency-- are you getting comparable information, accurate translation? You're looking at confidentiality and privacy as well. In other words, individuals with disabilities under the ADA are entitled to the same information. They must be able to perform the same tasks. And they must be able to receive the same privileges, opportunities, services available to others.

Now let me make one of the most important points of my presentation. We know that buildings must be accessible. Facilities must be accessible. And you don't wait until an individual shows up before you need to make it. New construction alterations are subject to a specific set of standards. If you've had existing buildings, there is a different standard called program accessibility. We know that. But we should be looking at information and communication technology in the same way that we look at facilities and buildings. They are the digital equivalent to making facilities, buildings accessible, without the presence of an individual making a specific request.

This is a quote from one of the regs. "Making acceptable ICT available only upon request would run counter to the basic premise that information and data must be accessible to all employees without special treatment." That means that the structure, the design, the development, the use of websites must be accessible, regardless of whether there are individuals with disabilities present. But, there's still the reasonable accommodation requirement because in some cases following general standards of access may not result in effective and meaningful opportunity.

We also know, again applying the broad general principle, that you cannot contract or make arrangements with vendors and transfer your responsibility because the vendor did not comply with designing a website, for example, in an accessible way. Furthermore, you cannot adopt

procurement training feedback policies or procedures that have the effect of denying access to information and data. Next slide please.

Now, currently the Department of Justice is enforcing the ADA in the area of website accessibility on a case-by-case basis, using these existing nondiscrimination [INAUDIBLE] opportunity policies that I just described. Now, I have personally reviewed every one of the now 170 settlement agreements that DOJ has entered with employers, state and local governments, and private businesses. And these websites-- I'm sorry, these settlement agreements are now posted on a website which I'll describe at the end of my presentation.

And what are the topics that are on this website that are described? Can we go to the next slide please? The topics that are included range from, what are the scope of the requirements? Some of the settlement agreements deal with websites. Others deal with online systems, including applications and training and instructional materials. Some include the requirements for mobile apps. And others deal with other forms of ICT.

All of the settlement agreements describe the technical accessibility standards that those entering the agreement have agreed to comply with in the design of their website, online systems, mobile apps, and other ICT.

Here's an example of a provision. They make reference to what's called the Web Content Accessibility Guidelines, "we-cag" or WCAG 2.0. And there's levels of success. There are three levels, level A, level B, and level C. They require access to-- I'm sorry, level A, level AA, and level AAA. It's A, AA, and AAA. And the settlement agreements require compliance with both level A and level AA.

There are also a number of settlement agreements that involved the covered entity and their vendors. Let me give you a typical provision and share with you a typical provision in a settlement agreement. The covered entity, whether it's an employer, a university, a public accommodation that is a private business, must develop and implement a procurement process to ensure ICT purchased or leased is accessible, including language requiring contractors to warrant their compliance with WCAG 2.0 A and AA, to provide testing results, written documentation verifying accessibility, to promptly respond to and resolve accessibility complaints, and indemnify and hold the covered entity harmless in the event of claims arising for inaccessibility.

There were also a number of settlement agreements with employers. A typical provision reads

as follows-- "The employer shall ensure that its employment opportunities website and job applications contained therein conform to, at a minimum, WCAG 2.0 level A and level AA success criteria."

DOJ has also entered into any number of settlement agreements with private businesses with respect to the goods and services that they make available. Examples include EdX, CBS Broadcasting, H&R Block, QuikTrip, Blockbuster, Carnival Lines, Greyhound, The Newseum, Wells Fargo, and Webster Bank.

Many of these settlement agreements also not only require accessibility and set out the standards, but they also require, again, what I refer to as methods of administration. And that is the covered entity, whether it's an, again, employer, a business, or an education institution, must adopt ICT accessibility policies. And they must distribute that policy. The settlement agreement requires certain evaluations of access be undertaking, testing be undertaken, and that there be a feedback mechanism so people can share their experience using the website, online system, app, et cetera.

Also require that there be changes in the procurement policies, that there be training and there be guidance that is provided. And they also require the identification of an individual office or consultants who are experts in ICT accessibility.

Now just, I guess it was last week on October 17-- maybe it was earlier this week-- the Department of Justice put on its website a new proposed consent decree between Dudley, the United States of America, and Miami University. And this is a landmark consent decree that should absolutely should be reviewed, particularly by those on the phone who are working at institutions of higher education. Because not only do they talk about requirements and standards, but they talk about different agreement for new content that is put on, preexisting content, legacy, archives, third party content. They also require the designation of a web access coordinator, the establishment of an accessibility committee, to provide training, to change the procurement policies, to require testing, there be an audit evaluation, corrective action plan. This is, again, the most current and landmark settlement agreement that should be reviewed by folks. Next slide please.

Now one of the things that you may be asking which is a clear and important question is what's in the regs, what specifically applicable to website accessibility and accessibility of other ICT? Because if you'll recall in my presentation, I talked about the general requirements that are

made applicable to accessible ICT.

In fact, the current regs do not include specific standards. And the Department of Justice, in 2010, issued what they call an advanced notice of proposed rulemaking, saying what they were thinking about doing in terms of making explicit-- which is now only subject to the general requirements-- to make explicit requirements with respect to web accessibility under Title II of state and local governments and Title III, public accommodations of the ADA.

In 2015, DOJ announced that it was going to have a separate rule makings for Title II and a separate one for Title III. And in May of 2016, the Department of Justice, instead of issuing a proposed reg, issued a supplemental advanced notice of proposed rule making. This one only applied to state and local governments. They have delayed, for several years, the approach, whether it's another advanced supplemental advance for public accommodations or issuing a proposed rule, backed off for a couple of years. That comment period closed a couple of weeks ago for this supplemental advanced notice of proposed rulemaking. DOJ published 123 questions that they wanted addressed to help them provide background before they issued their proposed reg on web access applicable to state and local governments.

And the questions include topics such as what do we mean by web content? What should be the standards for web access? What should be the time frame for compliance? How do we deal with captions for the live audio content and synchronized media? And should there be certain exceptions to the web access requirement, for example archived web content and third party web content?

Again, the comment period is closed, but you can certainly visit the Department of Justice website to see what your colleagues have said in terms of comments. I have developed a policy brief on the supplemental advanced notice of proposed rulemaking. And that policy brief is also on the PEAT website, which I will be referencing at the end of my presentation. Next slide please.

So what are some of the key takeaways from my presentation? We all know that the current reality is that internet and intranet is integral to doing business in our contemporary society. And it would be, in the words of DOJ, a travesty if people with disabilities were left behind or left out in terms of access to information and data that is available to others.

Another takeaway is that under the current regulations, effective and meaningful opportunity to access information and data it is required by the current regs. And it also is good business. It

is good business to have your website accessible to the greatest number of people-- again, the concept of universal access. DOJ has said that they are enforcing the ADA in the areas of website access on a case-by-case basis under existing rules, and will continue to do so until the issue is addressed in a final regulation.

And the last takeaway is, from my perspective, it's not a question of whether-- it is not a question of whether but when your company, you as an employer, you as an institution of higher education, will be held responsible for ensuring the procurement and use of accessible websites, online systems, mobile apps, and other forms of ICT, because DOJ is pursuing, on a case-by-case, settlement agreements. And if you read the literature, there are hundreds of suits that are being filed by private entity individuals challenging the lack of accessible websites. To me, it would be smart to incorporate web access designs sooner than later, particularly if your website online system is being newly purchased, leased, updated, and/or refreshed. Next slide.

Here are a number of resources that are available on the PEAT website. And if you're really interested in sharing some information with the Department of Labor, there is an open discussion. And you can go to their website, PEATWorks.org, to find it under Making It Happen. And there is currently a dialogue with DOL to raise awareness about access to websites in the employment context. And that will be open in terms of comments until tomorrow.

So we have PEATWorks, which is a central hub for accessible technology, news, events, tools, and resources, TalentWorks, which is the latest PEAT resource that helps employers and human resource personnel make their eRecruiting technologies acceptable, and PEATTalks, which is a virtual speaking series. I am now going to open it up for questions.

PATRICK LOFTUS: All right. Bobby, thank you so much for that great presentation. And excellent point maybe in there about being proactive. And we encourage everyone to go check out PEAT until tomorrow. We will get started on Q&A in a moment. We have a lot of great questions coming in. So let's get right into Q&A.

First one. Bobby, someone is asking, it sounds like the DOJ is taking a vested interest in web accessibility, but they just pushed back the decision to update Title II. Do you have any insight into why they're holding off?

BOBBY SILVERSTEIN: I do not have any inside information. It's not only Title II, state and local government. Again, after five years, in 2010, they issued an advanced notice of proposed rulemaking. And instead of in 2016 issuing a proposed reg, they did a supplemental. Why, I cannot tell. This is obviously a very important issue as the gateway civil rights issue. And all I can assume is they want to make it right.

PATRICK LOFTUS: Great. Thanks, Bobby. Next question.

BOBBY SILVERSTEIN: And again--

PATRICK LOFTUS: Oh, sorry.

BOBBY SILVERSTEIN: --they've also delayed Title III, public accommodations, and rather than doing them together, whether it's 2017 or 2018-- we do not know-- remains to be seen.

PATRICK LOFTUS: Great. Thank you, Bobby. Next question here. Do you have any recommendations on steps we should be taking in the interim while we're waiting for the DOJ updates to the ADA's requirements for web accessibility?

BOBBY SILVERSTEIN: I think, again, what I would urge all of you to do is to look at this *Dudley versus-- Dudley and USA versus Miami University*, which was published on the DOJ website on October 17. And why? Because A, look at not only the standards for requirement, but they look at distinguishing between new, preexisting, legacy, archives, third party, and prospective applicants. So they are beginning to give you a signal on where they're going.

What would I do? I would do a strategic plan on accessibility. I would involve people with disabilities, maybe civil rights folks, as well as your human resources folks and your information and communication technology experts. I would be doing a needs assessment, a survey, of where you are. I would be doing priorities. And what would some of my priorities be? Would clearly be on things that are most accessible and important to all people, including people with disabilities. And I would be looking at new issues, newly leased, newly purchased. I would be looking at, are you updating, are you refreshing your website or other systems? Just at least start with what is newly purchased, newly leased, what's updated, and what's being refreshed.

PATRICK LOFTUS: Thanks, Bobby. Some great advice there. Another question about a comment you made earlier in the presentation. Someone is asking, why is the Miami University settlement considered landmark compared to other university cases like Penn State?

BOBBY SILVERSTEIN: The reason is because it is the most comprehensive of any that I have read. And again, I have read all 170 settlement agreements. And this one has more specificity with respect to what types of content we're talking about and what I call the methods of administration. They have more detail on the requirement to have an accessibility policy, have an accessibility committee, who should be on it, what kind of training should be provided, what should be in your procurement procedures, what kind of testing is appropriate, what kind of auditing and evaluating. There's much more detail with respect to these issues then any others that I have reviewed.

PATRICK LOFTUS: Thanks, Bobby. And that's certainly a lot of reading. Next question here-- if an organization purchases a third party product that is not accessible, who is responsible for the accessibility of that product-- the third party vendor or the company who purchased it?

BOBBY SILVERSTEIN: Again, if we go back to one of the key precepts of ADA, it is that you cannot do indirectly that which you are prohibited from doing directly. In other words, you cannot enter into a contract or other arrangement that has the purpose or effect of denying opportunity. So you cannot say that you're technically not accountable.

Now what some of these settlement agreements are doing, as I read to you, is that they are requiring the covered entity-- the college, the employer, the public accommodation-- to have a contract with the vendor which holds the vendor accountable. The fact is between the covered entity and the vendor, from an ADA perspective, the covered entity is responsible.

PATRICK LOFTUS: Great, Thanks, Bobby. And along similar lines, someone is asking, how can we get our software, vendor, and procurement companies to provide the accessibility accommodations we need if they're not held liable when we are?

BOBBY SILVERSTEIN: Well, again, you can hold them liable in your contract. That's what the settlement agreements are urging folks to do, to enter into contractual arrangements that hold the vendor accountable.

PATRICK LOFTUS: Great. Thanks, Bobby. Next question here--

BOBBY SILVERSTEIN: Well, there--

PATRICK LOFTUS: Oops, sorry.

BOBBY SILVERSTEIN: Yeah, go ahead. Go ahead. Go ahead.

PATRICK LOFTUS: Next question here is, do prosecutors use a tool like the WAVE WebAIM tool to test websites? And what do they look for? And do they consider all issues or just the highest-level issues?

BOBBY SILVERSTEIN: They consider-- again, if you go to the PEAT website, you'll see some of those tools that are being used. And what we've got now that, again in these settlement agreement and the direction it looks like DOJ is going to be pursuing-- and again, consistent what the United States Access Board is doing in their Section 508 regulations-- 508 requires federal agencies to procure accessible information and communication technology. We're all going in the same direction of harmonization of standards. And that's the WCAG, "we-cag" 2.0 AA success criteria. So that's the initial standards for what constitutes the satisfaction of the requirements for accessibility.

Now as I mentioned earlier, there may be some individuals who still need accommodations after you have complied with all of the requirements. And that will be on a case-by-case basis based on an interactive process between the individual and the covered entity.

PATRICK LOFTUS: Great. Thank you, Bobby. Another question here-- do you mean that we're at risk if we don't make our site fully accessible even if there hasn't been an accommodation request?

BOBBY SILVERSTEIN: That is exactly what I'm saying.

PATRICK LOFTUS: Excellent. That certainly answers that person's question, I hope.

Next question here-- as a small business wanting to get government contracts, does my website need to be accessible to all assistive devices? Are there standards we should be following?

BOBBY SILVERSTEIN: Say that again so I make sure. So you're saying that you're a government contractor for the federal government?

PATRICK LOFTUS: The person is asking, as a small business wanting to get government contracts, does my website need to be accessible to all assistive devices? And are there standards we should be following?

BOBBY SILVERSTEIN: We have another policy called Section 503 of the Rehabilitation Act. And that is a provision for nondiscrimination and affirmative action by federal government contractors. And there are certain rules that apply. And in their peculiar regulations, I'm going to quote to you some of what's in the reg. It said that "their accommodation obligation extends to the contractor's use of electronic and online application systems. If a contractor uses such a system, it must provide necessary accommodations to ensure that the individual who is not able to fully utilize the system is nonetheless provided with equal opportunity. Though not required, it is of best practice for the contractor to make its online job application system accessible and compatible with assistive technologies." It goes on to say "the contractor must ensure that applicants and employees with disabilities have equal access to its personnel processes, including those implemented through ICT." It's required to make sure there is effective opportunity to accommodations and are encouraged to make this information accessible, even if no specific request. And then they make reference to the WCAG 2.0 AA.

PATRICK LOFTUS: Great. Thanks, Bobby. Another question here-- do you know what is going to be required under the Section 508 ICT refresh due out later this year?

BOBBY SILVERSTEIN: No, I don't. But again, if you are interested, there is also a policy brief that I wrote about the 508 notice of proposed rulemaking on the PEAT website.

PATRICK LOFTUS: Great, and we hope you'll check it out.

BOBBY SILVERSTEIN: So we've got three things on the PEAT website. We have all of the 170 settlement agreements organized by all those different topic areas that I identified. So if you're only interested in what has been said about employer responsibilities, you can click on that particular 15 or so settlement agreements. If you're interested in the method of administration dealing with evaluation or testing, you can find the specific ones that just deal with that issue. In addition, there's a policy brief on the supplemental advanced notice of proposed rulemaking and a policy brief on the 508 refresh.

PATRICK LOFTUS: Great. Thanks, Bobby. So another question here-- we're running into issues where current technology doesn't allow for the accessibility features we need to implement. Do you know what the DOJ's take would be on this?

BOBBY SILVERSTEIN: I do not. And that's something that I would probably be talking to the experts. And if there's an issue that needs to be addressed, I would be-- even though the comment period is closed-- I would be directing that question to DOJ. Because I am sure if there's an issue that is critical and applies across the board, they will want to know what it is, even if the comment period is officially closed.

PATRICK LOFTUS: Great. Thanks, Bobby. Another question here-- how does the information presented today relate to the Accessible Instructional Materials in Higher Education Act for which a committee is being formed to move the act through Congress?

BOBBY SILVERSTEIN: That is a bill that was just recently introduced. It has two co-sponsors. It has been referred to the Committee on Education and the Workforce in the House of Representatives. So that would have to go through the regular course of the legislative process. What I'm saying, currently, is that Miami University and, I don't know, 40, 50 other, or 20-- I don't know the exact number-- universities have entered into settlement agreements with DOJ under existing regulations requiring that their instructional materials be accessible to and usable by individuals with disabilities. And again, there are a number of settlement agreements just entered between DOJ and institutions of higher education.

PATRICK LOFTUS: Thanks, Bobby. Another question here-- WCAG 2.0 level AA says that audio descriptions must be provided for all video content. No commercial video players support this feature. Does this mean that, for instance, a school district that produces videos as part of its communication efforts must stop doing so under WCAG 2.0 level AA standards?

BOBBY SILVERSTEIN: I believe this is one of the issues that is in the supplemental advanced notice of proposed rulemaking. And I would, again, raise this issue specifically with the Department of Justice.

And you'll notice what I'm doing. I am not the Department of Justice. When there are specific questions that ask for interpretations that are very fact-specific, I am intentionally not answering those questions because I think that would be inappropriate. That is best addressed directly by the Department of Education and/or the Department of Justice.

PATRICK LOFTUS: Great. Thanks, Bobby. Another question here-- what factors are generally considered when determining if something is an undue burden for an institution?

BOBBY SILVERSTEIN: I have also, when I have nothing else to do, have reviewed about 400 settlement agreements issued by the Department of Education Office for Civil Rights with respect to all issues under Section 504 nondiscrimination by recipients and ADA. But it's mostly 504 of the Rehab Act cases. And in not a single one did I see undue burden be a defense that was accepted, not a single one.

PATRICK LOFTUS: Wow. Thanks, Bobby. Next question here, just a couple--

BOBBY SILVERSTEIN: Let me-- they didn't ask this question, but if I could, Patrick, give you another answer, though, that's important.

PATRICK LOFTUS: Sure.

BOBBY SILVERSTEIN: This is the however. However, in the education context, another defense, that it's a fundamental alteration in the nature of the program. And there are multiple, multiple court cases and interpretations, including those that find a fundamental alteration. And in a nutshell, the courts provide great deference to academic decisions so long as they are thoughtful, careful, deliberative in nature, and done by the right folks. And that includes experts in education pedagogic as well as experts in disability policy and experts in the provision of accommodations.

PATRICK LOFTUS: Thanks, Bobby. And we have time for one more question here. Someone's asking, are businesses that only operate online covered by the ADA's requirements applicable to web accessibility?

BOBBY SILVERSTEIN: That's a really tough question in the sense that there is a disagreement around the country on what the answer to that is. So I will share with you what the issue is. I'll try to give you how the different courts have addressed it, and then give you my opinion.

Title III of the ADA, public accommodations, covers private entities. And they're considered public accommodations if their operations affect commerce in areas like sales, rental, service, places of education, places of recreation. They also say no individual shall be discriminated against by any place of public accommodation. That's the statute.

The regulation specifies that a place of public accommodation means a facility operated by a private entity. So the issue that the courts have wrestled with when a company only provides its goods and services online is the interpretation of a place or the interpretation of the word facility. And courts in the First, Second, Fifth, and Seventh Circuits have held or suggested that a place of public accommodation does not have to be a physical structure-- does not have to be a physical structure. In contrast, courts in the Third, Fourth, Sixth, Ninth, and Eleventh Circuits have held that they either need to have a physical structure or there needs to be, quote, a "nexus" between the online business and the physical structure.

Remember, from my perspective, if we go back to the 1992 statement that we have to construe these regulations as recognizing the developments of technology over time, and use the simple phrase "web site," you know that the clear, unequivocal intent is to cover businesses who only do business online. Now whether or not some courts have construed the reg to include the word facility-- but I totally agree with the Department of Justice in all of the amicus briefs that they have filed that when the statute talked about a place, they included a website.

All right. Well, thank you, Bobby, so much. I think that's about all the time we have for today. Thanks again for such a great presentation, and thank you everyone for joining. Again, keep an eye out for an email tomorrow that will arrive in your inbox with a link to view the recording and slide deck. And I hope everyone has a great rest of your day.

BOBBY SILVERSTEIN: Thank you. Take care. Bye bye.